

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Criminal Action No. 1:07-cr-00090-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. B&H MAINTENANCE & CONSTRUCTION, INC., a New Mexico corporation;
2. JON PAUL SMITH a/k/a J.P. SMITH; and
3. LANDON R. MARTIN,

Defendants.

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**UNITED STATES' REPLY IN SUPPORT OF  
"UNITED STATES' MOTION IN LIMINE TO EXCLUDE  
IMPROPER CHARACTER EVIDENCE" (DOCKET # 79)**

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This reply addresses the issues raised by Defendant B&H Maintenance & Construction, Inc. ("B&H") in its "Response to United States' Motion in Limine to Exclude Improper Character Evidence [Docket # 79]" (Docket # 91), hereinafter Def. B&H Resp. Docket # 91.<sup>1</sup>

First, the United States' Motion in Limine to Exclude Improper Character Evidence was not prematurely filed. It was filed on October 1, 2007, the date specified as the deadline for the

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<sup>1</sup> Defendants Jon Paul Smith ("Smith") and Landon Martin ("Martin") both join B&H's Response, Def. Resp. Docket # 91. See "JP Smith's Motion for Leave to Join Response Filed by Co-Defendant B&H Maintenance and Construction Regarding Motion in Limine to Exclude Improper Character Evidence [Document # 91]" (Docket # 104) and "Landon Martin's Joinder in Co-Defendant B&H Maintenance and Construction's Response to United States' Motion in Limine to Exclude Improper Character Evidence [Docket # 79]" (Docket # 106).

filing of evidentiary motions by the Court's Order of June 1, 2007 (Docket # 41).<sup>2</sup> Furthermore, the Motion appropriately raises matters regarding the nature and scope of the character and impeachment evidence relevant to the resolution of the issues in this case and properly admissible at trial.

The United States' Motion sought to prevent the Defendants from improperly attacking the credibility of witnesses pursuant to Federal Rule of Evidence 608 by: 1) presenting extrinsic evidence of specific instances of conduct; or 2) introducing character evidence not related to the witness's character for truthfulness. The United States also requested that the Court require Defendants to proffer evidence showing a "good faith basis" that alleged misconduct occurred before making statements or asking questions about any alleged misconduct. The Motion further sought to prevent the Defendants from improperly attacking the character of the victim of the offense charged in Count One of the Indictment, BP America Production Company ("BP America"), a corporation, citing to Federal Rule of Evidence 404(a)(2).

**I. Admissibility of Extrinsic Evidence of Specific Instances of Conduct and Impeachment Evidence not Related to Truthfulness**

Defendant B&H acknowledges that Federal Rule of Evidence 608 prevents attacks on the credibility of witnesses through extrinsic evidence of specific instances of conduct or by introducing character evidence not related to the witness's character for truthfulness. Defendant B&H then, however, turns its attention to Federal Rule of Evidence 404(b) and discusses the

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<sup>2</sup> That date was proposed by the Defendants (Defendants' Motion to Approve Defendants' Proposed Case Management Order (Docket # 40)) and accepted by the Court as appropriate.

admissibility of evidence of other crimes, wrongs or acts pursuant to that Rule.

The United States agrees that evidence may be admitted under Federal Rule of Evidence 404(b) for a number of proper purposes including: "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Fed. R. Evid. 404(b)*. The United States also agrees that Rule 404(b) is a rule of inclusion, rather than of exclusion. *See Huddleston v. United States*, 485 U.S. 681 (1988). *See also* "United States' Reply in Support of 'United States' Notice of Intent to Use Evidence of Other Crimes, Wrongs or Acts Pursuant to Federal Rule of Evidence 404(b)' (Docket # 83)" filed on November 1, 2007.

Defendant B&H's Response indicates that the Defendants will seek to introduce testimony by Harley Temple and Patrick Kannard as reverse 404(b) evidence. *See* Def. B&H Resp. Docket # 91 ¶¶ 23, 24. Defendant B&H also "proffers that the scope of bad acts and impeachment evidence that it intends to use at trial -- both on cross-examination and in its affirmative defense case -- may include conduct and issues other than what the government has identified in its *Motion*." Def. B&H Resp. Docket # 91 ¶ 22.

Whether the Temple and Kannard evidence, or the other evidence, unknown at present to the United States, is admissible depends on whether it is relevant and meets the standards for admissibility, even as reverse 404(b) evidence, under Federal Rules of Evidence 401, 402, 403, and 404(b), *Huddleston*, *supra*, and Tenth Circuit caselaw.

Evidence of other bad acts is properly admitted if four requirements are met: (1) the evidence is offered for a proper purpose under Fed.R.Evid. 404(b); (2) the evidence is relevant under Fed.R.Evid. 401; (3) the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice under Fed.R.Evid. 403; and (4) the district court, upon request, instructs the jury to consider the evidence only for the

purpose for which it was admitted.

[citations omitted] *United States v. Tan*, 254 F.3d 1204, 1207 (10th Cir. 2001).

While the right of a defendant to cross examine witnesses and to present a defense is guaranteed by the Constitution of the United States, that right is not unlimited. "The defendant's presentation of evidence is constrained by the twin prongs of relevancy and materiality. Simply stated, a criminal defendant does not have a constitutional right to present evidence that is not relevant and not material to his defense." *United States v. Solomon*, 399 F.3d 1231, 1239 (10th Cir. 2005). *See also United States v. Montelongo*, 420 F.3d 1169, 1173 (10th Cir. 2005) ("The right to cross-examine witnesses, however, is not without limits."); *United States v. Markey*, 393 F.3d 1132, 1135 (10th Cir. 2004) ("The right to present a defense, however, is not without limits. At a minimum, a defendant is limited to presenting relevant evidence. . . ").

To determine what evidence is relevant, one must turn to the elements of the offense charged. *See Markey*, 393 F.3d at 1135; *Montelongo*, 420 F.3d at 1173. In Count One of the Indictment the Defendants are charged with bid rigging in violation of Section One of the Sherman Act, 15 U.S.C. § 1. The elements the United States must prove are three: an agreement in restraint of trade (here, to rig bids); that the defendant participated in the agreement; and interstate commerce. With respect to Count One of the Indictment, Defendants are limited to introducing evidence that is relevant to proving (or disproving) these elements.

## **II. Request for Notice**

It is clear from the content of Def. B&H Resp. Docket # 91, that the Defendants will seek to introduce Federal Rule of Evidence 404(b) evidence as part of their defense. The United

States requests that the Defendants: 1) provide notice of the crimes, wrongs or acts they will seek to introduce; and 2) provide a "good faith basis" that misconduct occurred, so that the issues with respect to the admissibility of this evidence can be thoroughly briefed and argued before trial.

### **III. The Character of the Victim**

The victim of this offense, BP America, is a subsidiary of a large multi-national company with hundreds of offices and thousands of employees. *See* Disclosure Statement Pursuant to Local Rule 12.4 A.2. -- Organizational Victim (Docket # 13). The United States requests that the Court prevent the Defendants from introducing irrelevant evidence, making unfairly prejudicial or misleading statements, or asking unfairly prejudicial or misleading questions about the character of the victim. Clearly BP America's character cannot be impeached under Federal Rule of Evidence 608 since the corporation will not be a witness. However, Federal Rule of Evidence 404(a)(2) permits the introduction of "evidence of a pertinent trait of character" of a victim in a criminal case.<sup>3</sup> Nevertheless, the admissibility of all evidence is governed by the concept of relevancy. *See* Federal Rules of Evidence 401, 402 and 403. Therefore, to the extent that any evidence regarding the reputation of the victim is admissible, it must be relevant to an issue in the case.

The Defendants have not stated, and the United States does not understand, what "poor

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<sup>3</sup> If the defense introduces evidence of a pertinent character trait of the victim, the United States is then permitted to introduce similar character evidence relating to the defendant. *Fed.R.Evid.404(a)(1)*.

reputation" evidence Defendant B&H is alleging<sup>4</sup> exists regarding the victim of the offense charged in Count One of the Indictment, and how that evidence may be relevant to the issues in this case. Count One of the Indictment charges the Defendants with violating the Sherman Act by rigging bids submitted to BP America.. The Sherman Act protects competition by making it illegal to restrain trade. Everyone, individuals and corporations alike, is entitled to free and open competition, regardless of their reputation. Therefore, such evidence is irrelevant in the present case.

#### **IV. Conclusion**

As requested in its Motion in Limine to Exclude Improper Character Evidence (Docket # 79), the United States seeks an order that prevents the Defendants from improperly impeaching the character of witnesses under Federal Rule of Evidence 608 with extrinsic evidence of specific instances of conduct, or improperly introducing character evidence not related to truthfulness under Rule 608. The United States also seeks an Order limiting the evidence that the Defendants may adduce about the character of BP America, the victim of the offense, to that relevant to a "pertinent trait of character." *See* Federal Rule of Evidence 404(a)(2).

As it is clear that the Defendants will seek to introduce Rule 404(b) evidence in this case, the United States also requests that the Court order Defendants to: 1) provide notice of the crimes, wrongs or acts they will seek to introduce; and 2) provide a "good faith basis" that alleged misconduct occurred, so that the issues with respect to the admissibility of this evidence

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<sup>4</sup> Def. B&H Resp. Docket # 91 ¶ 8.

can be thoroughly briefed and argued before trial.

Respectfully Submitted,

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s/Diane C. Lotko-Baker

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**CERTIFICATE OF SERVICE**

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I hereby certify that on November 1, 2007, I electronically filed the foregoing "United States' Reply in Support of 'United States' Motion in Limine to Exclude Improper Character Evidence' (Docket # 79)" with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner indicated by the non-participant's name:

None.

Respectfully Submitted,

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s/Diane C. Lotko-Baker

DIANE C. LOTKO-BAKER

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s/Carla M. Stern

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